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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1009

WESTERN NATURAL GAS COMPANY, *Petitioner,*

v.

CITIES SERVICE GAS COMPANY, *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of the State of Delaware

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner Western Natural Gas Company replies to Respondent's Brief in Opposition to set forth recent developments bearing upon the issue of primary juris-

diction and to correct specific error in Respondent's argument:

1. In citing urgent necessity for this Court's clarification of Federal Power Commission primary jurisdiction, Petitioner referred in its Petition to the *Hennigh* case, a class action against Petitioner in a Kansas state court (Pet. p. 12 n. 11; pp. 19, 20). Plaintiffs in that case have now moved for summary judgment against Petitioner. Their contention is that despite past or future acts of the Commission, the Delaware courts or this Court, the Kansas court should now hold that Petitioner's payments to royalty owners must be on the basis of 11 cents and 15 cents per Mcf for periods involved here instead of the 8 cents purportedly established in the Delaware courts' opinions.

In an attempt to avoid two state court judgments which may conflict with each other and with Commission actions, Petitioner, on February 23, 1967, filed a further complaint before the Commission (FPC Docket No. RI67-310). Petitioner there cited the plaintiffs in the Kansas case as defendants, urged the Commission to exercise its primary jurisdiction over the controversy in the Kansas courts, and informed the Commission of the connection between that controversy and Petitioner's complaint against Respondent still pending in Commission Docket No. G-14,958, which, as pointed out in the Petition here, has never been acted on (Pet. pp. 8, 14, 16).

Petitioner thus now faces imminence of conflicting state court and agency decisions as to liabilities flowing from the same set of facts and agency actions, a situation in which any past "deferral" of exercise of agency

jurisdiction cannot continue.[1] Assumption of Commission primary jurisdiction has become imperative to resolve these controversies in a single forum, with finality as to all parties and agencies involved.

2. Respondent concedes here that Petitioner preserved the question of Commission primary jurisdiction throughout the proceedings in the Delaware courts (Resp. Br. pp. 4-5); that the opinions below are final (Resp. Br. p. 6); that Petitioner's Complaint raising the same issues is still pending before the Commission (Resp. Br. pp. 10-11); and that the issue of primary jurisdiction was *not* brought here by petitions following *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F. 2d 561 (8th Cir.), cert. denied, 370 U.S. 937 (1962), and *Landon* v. *Northern Natural Gas Co.*, 338 F. 2d 17 (10th Cir. 1964), cert. denied, 381 U.S. 914 (1965).[2]

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[1] The situation has changed markedly since the 1958-1961 period discussed in Respondent's Brief. Cities then urged the Commission to defer acting on Western's complaint in Docket No. G-14,958 because a number of collateral issues involving the Kansas minimum price order, not within Commission primary jurisdiction, were still unresolved in pending court cases, *e.g.*, whether the state order was void *ab initio* or only after the date of federal pre-emption; whether invalidation was limited only to volumes resold subject to Commission jurisdiction; whether a refund contract existed; and whether recovery was precluded under doctrines of limitations of actions, voluntary payment, estoppel, etc.

Today, however, these issues all have been decided. The Commission thus may now proceed upon remaining questions of effective rates under the Natural Gas Act and the legal effect of Commission actions, all of which fall within the Commission's primary jurisdiction as the doctrine is spelled out in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59 (1956), and *Far East Conference* v. *United States*, 342 U.S. 570 (1952).

[2] Resp. Br. p. 9 n. 8.

Respondent nevertheless attempts to show that the question of primary jurisdiction was considered in *Pan American Petroleum Corp.* v. *Superior Court of the State of Delaware,* 366 U.S. 656 (1961). In so arguing, Respondent demonstrates the confusion engendered by *Pan American* in both state and lower federal courts.

The issue presented in *Pan American,* as in *Gully* v. *First National Bank,* 299 U.S. 109 (1936), was only whether underlying federal questions *ousted* a state court of jurisdiction at the outset, requiring the plaintiff to initiate its action in a federal District Court. Primary jurisdiction of the Commission was neither raised, briefed, argued, nor discussed in the case. This Court held, as in *Gully,* that because the face of the complaint did not disclose assertion of a federal right or immunity, the state court could entertain the complaint. The Court, however, stressed that it was not passing upon questions that could later be raised as to the effect of the Natural Gas Act upon the asserted right of recovery (366 U.S. at 664), and Cities itself emphasized that such questions were not then before this Court.[3] Clearly, the question of primary agency jurisdiction, emergent before the state court at a later point in the proceedings, was neither considered nor passed upon in *Pan American.*

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[3] In its brief filed with this Court in *Pan American,* Cities stated: "The single question presented to and decided by the Delaware Court was whether or not the trial court had jurisdiction, not to render a particular judgment, but to entertain the cases before it." Brief for Respondent Cities Service Gas Co., filed March 20, 1961, p. 20 (No. 80, O.T. 1960).

Cities' misreading of *Pan American,* and similar misinterpretation by lower courts in the cases Cities cites (Resp. Br. p. 5 n. 5; pp. 13-14), thus emphasize the necessity for prompt clarification here upon the issue of primary jurisdiction. In the Kansas royalty owners' cases, *Pan American* is cited, as Cities does here, as holding that the Commission has no primary jurisdiction over the pending controversies.

While the Fifth Circuit in the *Huber* and *Weymouth* cases has followed the most recent opinions of this Court as to primary agency jurisdiction, neither the Delaware courts, nor the Kansas courts to date, have done so. Yet, it is in the area of state court-Commission relationship that *Pan American* has been the subject of greatest misinterpretation, leading now to the imminent prospect of not less than two conflicting judgments as to liabilities of Petitioner and other regulated companies.

3. On the issue of the merits of the filed rate doctrine, Cities carefully ignores the legal effect of the Commission actions in this case under Sections 7 and 5(a) of the Natural Gas Act, all of which pre-dated the attempt of state courts to enter judgments against Petitioner, and none of which was involved in cases Cities cites. Cities instead attempts to translate, rationalize or explain away Commission actions under Section 4 in this and other cases, but all of this merely underscores that the Commission—not a state court or a private party such as Cities—should first pass upon all questions of meaning and effect of these agency actions and of their legal impact upon the rights of the private parties.

Moreover, Cities misstates the issue and relevance of cases it cites (Resp. Br. pp. 13-14).[4] The issue here is not whether, as held in such cases, the state order, after invalidation, did not operate to change a "contract rate"; the issue is whether Commission actions under the Natural Gas Act operated to establish an exclusive, federal rate, regardless of the status of a state order or antecedent contract. See *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411 (1959); *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (5th Cir.), cert. denied, 332 U.S. 770 (1947). In *Southwestern*, this Court held that an exculpatory clause in a tariff filed with (but not "approved" by) the Interstate Commerce Commission was not automatically ren-

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[4] Cases cited by Cities were either (1) timely petitions properly brought under Section 19(b) of the Natural Gas Act for review of Commission actions upon rates (*Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 253 F. 2d 3 (3rd Cir. 1958); *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir.), cert. denied sub nom., *Magnolia Petroleum Co.* v. *Cities Service Gas Co.*, 358 U.S. 837 (1958)); (2) collateral litigation before the same Delaware courts and underlying the opinions here involved (*Helmerich & Payne* v. *Colorado Interstate Gas Co.*, 187 A. 2d 67 (Del. 1962); *Columbian Fuel Corp.* v. *Superior Court*, 158 A. 2d 478 (Del. 1960); *Cities Service Gas Co.* v. *Columbian Fuel Corp.*, 155 A. 2d 879 (Del. Super. Ct., 1959)); or (3) collateral litigation which did not involve Commission actions under Sections 5(a) and 7 of the Act (*Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F. 2d 561 (8th Cir.), cert denied, 370 U.S. 937 (1962); *Saturn Oil & Gas Co.* v. *Northern Natural Gas Co.*, 359 F. 2d 297 (8th Cir. 1966); *Cities Service Gas Co.* v. *United Producing Co.*, 212 F. Supp. 116 (N.D. Okla. 1960); *Northern Natural Gas Co.* v. *Landon*, 212 F. Supp. 856 (D. Kan. 1961), aff'd., 338 F. 2d 17 (10th Cir. 1964), cert. denied, 381 U.S. 94 (1965)).

dered invalid as a part of an effective tariff merely because, as this Court had held in an earlier case, such clauses were against public policy, and therefore void, under private law. The Court directed referral to the agency of the question of validity of the provision as a part of the tariff under federal law. The Court's decision illustrates the fallacy of Cities' argument (Resp. Br. p. 12 n. 12; p. 13) that "acceptance" of a rate for filing by an agency, without "approval," has no legal significance in rate regulatory law. The case also illustrates the conflict between this Court's decisions involving filed rate issues and decisions of lower courts, misinterpreting Federal Power Commission orders, relied upon by Cities. See *Cities Service Gas Co.* v. *Columbian Fuel Corp.*, 155 A. 2d 879 (Del. Super. Ct. 1959); *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F. 2d 561, 567 (8th Cir.), cert. denied, 370 U.S. 937 (1962); *Landon* v. *Northern Natural Gas Co.*, 338 F. 2d 17, 20 (10th Cir. 1964), cert. denied, 381 U.S. 914 (1965).

Under the filed rate doctrine, Commission actions under Sections 4, 5, and 7 should not be treated as "void" or without legal significance in collateral litigation. This case thus presents the vehicle for a necessary and clear declaration that under the Natural Gas Act, as under the Interstate Commerce and Federal Power Acts, rates made effective and recognized by Commission actions are binding collaterally and remain so until modified through Commission action under Sections 4 and 5 of the Act.

CONCLUSION

For these reasons and those previously set forth, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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